United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7329

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For the Second Circuit

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Plaintiffs-Appellees,

against

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLEES

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CORRECTIONS

The first line of text on page 31 which now reads "January 1, 1976" should read "January 1, 1975".

The first full sentence of text on page 36 which presently reads "which arose or occurred prior (to January 1, 1977)" should read "which arose or occurred prior (to January 1, 1975)".

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund, Plaintiffs-Appellees, -against- THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York, Defendant-Appellant.	No. 76-7329

Appeal From the United States District Court
For the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

Preliminary Statement

The decision appealed from was rendered by District Judge Charles M. Metzner. Judge Metzner's opinion and order are reported at 414 F.Supp. 473 and are reproduced at pages 58a-64a of the Joint Appendix.

Statement Of The Issue Presented For Review

Whether the district court erred in granting plaintiffs' motion for summary judgment based upon its determination that Section 514 of the Employee Retirement Income Security Act does not permit a state to exercise jurisdiction over a pension plan where no cause of action arose or act or omission occurred before January 1, 1975?

Statement Of The Case

Defendant-Appellant's Appeal

The defendant-appellant Thomas A. Harnett, as Superintendent of Insurance of the State of New York ("the Superintendent of Insurance"), appeals from a judgment dated July 15, 1976 (65a-67a) entered in the United States District Court for the Southern District of New York on July 16, 1976 (1a, 67a) upon an opinion and order of Judge Metzner dated June 3, 1976 (58a-64a). Judge Metzner granted plaintiffs' motion for summary judgment, and enjoined defendant from proceeding against plaintiff by reason of any alleged violation of the Insurance Law of the State of New York ("the Insurance Law") pertaining to Seymour Eskowitz.

The Parties

The plaintiffs-appellees Harold D. Azzaro, Samuel Gallo, Gerald Handley, Samuel Rubin, Ben Ciliberto and Jack Schuman ("the Trustees") sue as Trustees of the Bakery Drivers Local 802 Pension Fund ("the Pension Fund").*

Defendant-appellant is sued herein in his capacity as Superintendent of Insurance of the Insurance Department of the State of New York ("the Insurance Department")** pursuant to Sections 502 and 514 of the Employee

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*The Pension Fund is a pension trust fund established pursuant to and in accordance with the requirements of Section 302 of the Labor Management Relations Act of 1947 as amended, 29 U.S.C. Section 186(4a, 43a); and is an employee benefit plan established and maintained by employers engaged in commerce and by an employee organization representing employees engaged in commerce and in an industry and activity affecting commerce within the meaning of Section 4(a) of ERISA (4a-5a, 43a-44a).

**Section 10 of the Insurance Law provides that "there shall continue to be an insurance department of the state of New York" and that "the head of the department shall be the superintendent of insurance...." N.Y. Insurance Law §10 (McKinney 1966). Sections 37-37g of the Insurance Law regulate "employee welfare funds," which are defined by the statute to include joint trust funds maintained by employers and labor organizations to provide employee benefits, including retirement benefits, for employees, or their families or dependents. N.Y. Insurance Law §37-a. 1. & 2. (McKinney 1966). These sections are similar to the provisions of ERISA which regulate employee benefit plans in many respects. Section

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Retirement Income Security Act of 1974 ("ERISA").*

The Action Below

The action below was instituted by the Trustees of the Pension Fund in response to a threat by the Superintendent of Insurance to proceed against them under the Insurance Law as a result of the refusal of the Trustees to provide the Insurance Department with information concerning the pension benefit status of Seymour Eskowitz, ("Eskowitz"), a Pension Fund participant, on the ground that

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37-1 gives the Superintendent of Insurance compliance and enforcement powers with respect to employee welfare funds and their trustees in accordance with that section and Sections 37-37k. Section 37-1. 7.(a) [now 8.(a)] in particular provides that "[a]ny person who wilfully violates or causes or induces the violation of any provision of this article [Article III-A pertaining to employee welfare funds] or any regulation hereunder shall be guilty of a misdemeanor." N.Y. Insurance Law §37-1. 8.(a) (Supp. 1975). The imposition of penalties upon the Trustees threatened by the Associate General Counsel of the Insurance Department "pursuant to the provisions of Section 37-1(6)" refers to the above described provision.

*4a; P.L. 93-406; 88 Stat. 829; 29 U.S.C.A. §§1001 et seq.

the Insurance Department is without jurisdiction to request such information.

The complaint was based on Section 514 [Section 1144] of ERISA which provides in pertinent part:

> "(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...."
>
> * * *
>
> "(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975."

The Trustees acted to obtain a declaration of their rights and to prevent the imposition of fines upon them and their removal from office by the Superintendent of Insurance.

a. The Correspondence Between the Trustees and the Insurance Department

By a letter dated March 25, 1975 to the Insurance Department (stamped as "Received April 8, 1975" by the Department's Pension and Non-Profit Plans Unit), Eskowitz inquired with respect to the present status of his pension benefits (50a-52a). As will be shown below, this was the first inquiry made by Eskowitz. He had not previously communicated with the Pension Fund or the Insurance Department.

Thereafter, the Insurance Department requested, by a letter dated April 25, 1976, that the Trustees supply detailed information concerning Eskowitz's pension benefit status (23a; cf. 21a, 31a-32a, 44a). The information requested included:

1) a summary of Eskowitz's work record with Local 802;

2) a statement by the Trustees of the effect of Eskowitz's employment by another local of the same union upon his pension status with the Pension Fund and the reasons for this effect;

3) a statement of any provisions of the Pension Fund plan concerning the vesting of benefits and a statement of the effect of any applicable vesting provision on Eskowitz's pension status; and

4) a copy of the latest Pension Fund benefit booklet (23a; cf. 32a 44a).

The Trustees replied to this inquiry by a letter dated June 2, 1975, stating that the Insurance Department letter of April 25, 1975 "was the first occasion on which this [the Eskowitz] matter was brought to the attention of the Trustees." They requested that the Insurance Department advise them as to the basis of its jurisdiction "in view of the fact that Section 514 of ERISA provides that the federal law supersedes state

law except as to 'any cause of action which arose, or any act or omission which occurred, before January 1, 1975'" (24a; cf. 5a, 32a-33a, 44a-45a).

It is undisputed that no inquiry concerning Eskowitz was made to the Trustees by the Insurance Department before January 1, 1975. It is also undisputed that the request for information by the Department in April, 1975 was the first communication of any kind concerning Eskowitz received by the Trustees. No question had arisen between them, and no dispute or controversy of any kind existed.*

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*The answer herein (16a-17a) denies paragraph 14 of the complaint which avers that "[n]o claim was made by Seymour Eskowitz against the Trustees and no dispute existed between Seymour Eskowitz and the Trustees at any time prior to January 1, 1975 (7a)." Paragraph 13 of Plaintiffs' Statement Pursuant to Local Rule 9(g) (46a-47a) reiterates this allegation. Paragraph 5 of the affidavit of Joan Norton, the Fund Office Manager, denies receipt of any claim or communication of any kind concerning Seymour Eskowitz by the Pension Fund or the Trustees prior to receipt of the April 25, 1975 inquiry of the Insurance Department (21a). Contrary to the requirements of Rule 56(e) of the Federal Rules of Civil Procedure that where a motion for summary judgment is made and supported in accordance with Rule 56 "...an adverse party may not rest upon mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided by this rule, must set forth the specific facts showing that there is a genuine issue for trial," defendant below failed to set forth any facts with

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The Insurance Department replied to the foregoing response by the Trustees by a letter dated June 5, 1975 asserting that "[i]nasmuch as almost all of Mr. Eskowitz's pension credits were earned or accumulated prior to January 1, 1975, this Department has not been superseded in this matter," and requesting that the Trustees reply to the April 25, 1975 inquiry of the Insurance Department (25a; cf. 5a-6a, 33a, 45a).

The Trustees responded by their letter dated June 11, 1975 stating "that the earning of Pension Credit prior to January 1, 1975 does not of itself constitute a 'cause of action which arose, or any act or omission which occurred, before January 1, 1975' within the meaning of

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respect to this allegation. The defendant having completely failed to present any proof by affidavit or otherwise to controvert paragraph 14 of the complaint or paragraph 5 of the affidavit of Joan Norton, the defendant's attempt to raise this issue by its answer must be deemed sham and frivolous.

Section 514 of ERISA,"* and further stating that if the construction of Section 514 advanced by the Insurance Department were accepted "the jurisdiction of the various States would continue indefinitely regardless of the commission of any wrongful act by the administrators of Pension Funds prior to January 1, 1975" (26a; cf. 6a, 35a, 45a).**

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*The Superintendent of Insurance apparently now concurs with this view. Defendant-appellant's memorandum below and brief on appeal state in this regard that "[n]o one claims that the earning of pension credits constitutes a 'cause of action' or an 'act or omission' within the meaning of §514(b)" (Def-App. Br. p.5; Def. Mem. p.4).

**The plan administered by the Trustees provides for "normal" pension benefits at age 65 after 25 years of service. The plan also provides for a "service" pension based upon 35 years of service regardless of age. Minimum pension benefits available under provisions for "reduced", "early retirement", and "disability" pension benefits require no less than 15 years of service (34a, 47a; also see plan description in Exhibit "E" attached to the affidavit of Samuel J. Cohen, on file with the Court but not reproduced in the appendix). As a result of the foregoing pension requirements, it is evident that if the Insurance Department were permitted to continue to investigate and regulate employee benefit plans based solely upon the fact that pension credits were accumulated prior to January 1, 1975 and upon a mere inquiry made after that date by the Department as to an employee who commenced work prior to January 1, 1975, regardless of any dispute or controversy prior to that date, the state agency would continue to have jurisdiction over claims for 15 to 35 years after January 1, 1975 (34a, 47a).

The Associate General Counsel of the Insurance Department subsequently responded for the Department by a letter dated July 2, 1975 requesting that the Trustees reconsider their position and warning that:

> "If the subject fund's Trustees' position remains unchanged, this Department will have to consider the issuance of a Citation against them for willfully violating the Insurance Law pursuant to the provisions of Section 37-1(6) which can result in the imposition of penalties not to exceed $2,500 upon trustees and/or their removal from office, or both such penalty and removal." (10a-15a at 11a; cf. 6a, 35a-36a, 45a-46a)

After considering the Eskowitz matter at their July 23, 1975 meeting, the Trustees informed the Insurance Department by letter dated July 24, 1975 that:

> "After full consideration of this matter and consultation with legal counsel, the Trustees have decided to adhere to their position as previously stated, on the ground of the exclusive jurisdiction of the federal government." (30a; cf. 7a, 21a-22a, 36a-37a, 46a)

b. Pleadings

On August 5, 1975, the summons and complaint herein were served upon the Insurance Department, and the Department answered on September 23, 1975 (1a-17a; cf. 37a). The complaint alleges, on the basis of the foregoing facts, that:

a) the Trustees fear and expect that they will be subjected to criminal or quasi-criminal prosecution as threatened by the defendant;

b) the mere earning or accumulation of pension credits by an employee prior to January 1, 1975 does not constitute a cause of action which arose, or an act or omission which occurred prior to January 1, 1975 within the meaning of Section 514 of ERISA;

c) the Trustees wish to discharge their legal obligations fully and faithfully but do not wish to be subjected to unlawful harassment and criminal prosecution or to duplicate state and federal regulations unless required by law;

d) the subject matter of the action is solely within the jurisdiction of the federal government and of the federal courts; and that

e) the Trustees will suffer serious and irreparable injury by being subject to criminal prosecution in the courts of the State of New York unless enforcement of Article III A of the Insurance Law is enjoined (7a-8a; cf. 47a).

The complaint seeks injunctive relief against the Superintendent of Insurance, and a declaration of the rights of the Trustees with regard to the subject matter of the action (8a-9a).

The answer denies the allegations of paragraphs 13-15, 17 and 19 of the complaint, and asserts as an affirmative defense that:

> "...[b]y virtue of Sec. 514(b)(1) of the Pension Reform Act of 1974 the State of New York retained jurisdiction over any act or omission of plaintiffs which occurred before January 1, 1975...[and] [t]hat the subject matter under investigation herein deals with the investigation of such alleged acts or omissions." (16a-17a at 16a).

c. Plaintiffs' Motion for Summary Judgment

The Trustees thereafter moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure by a Notice of Motion dated January 16, 1976 (1a, 18a-19a) based upon:

a) the pleadings and exhibits attached thereto (2a-17a);

b) a Statement of Material Facts Pursuant to Rule 9(g) of the General Rules of the Court (43a-48a);

c) the affidavits of Samuel J. Cohen and Joan Norton and the exhibits attached thereto (20a-42a); and

d) a memorandum of law dated January 15, 1976 in support of the motion (18a-19a).

The Superintendent of Insurance opposed the motion for summary judgment by submitting a "Statement Under Rule 9(g)" dated March 26, 1976 and the exhibits attached thereto (49a-53a), together with a memorandum of law in opposition to plaintiffs' motion for summary judgment. Defendant's Statement of Material Facts Pursuant

to Rule 9(g) alleged "that there are issues of fact as to the following matters:"

> "(a) the knowledge or information of the trustees regarding the accrual of any cause of action or occurrence of any act or omission prior to January 1, 1975 within the meaning of ERSA [sic] §514 (¶12).
>
> (b) the desire of the trustees to discharge their legal obligations (¶14).
>
> (c) alleged irreparable injury to plaintiffs (¶16)." (49a)

It is the plaintiffs' position that these pretended issues of fact are frivolous and sham.

The Trustees replied by an affidavit of James V. Morgan (54a-57a) and a reply memorandum dated April 14, 1976.

In response to the affidavits, exhibits and memorandums submitted by plaintiffs in support of their motion for summary judgment, the Superintendent of Insurance failed to support his denials of the allegations of the complaint, or the allegations contained in his affirmative defense and Statement Pursuant to Rule 9(g),

and accordingly raised no genuine issue of fact to be tried. No alleged "acts or omissions" referred to in defendant's answer and in his Statement Pursuant to Rule 9(g) were ever shown by defendant (16a-17a; 49a). Neither by affidavit, nor otherwise did defendant in any respect attempt to support these allegations. Under such circumstances it was appropriate and necessary for the district court to determine the legal issues presented.

d. The Decision and Opinion of the District Court

After argument of the motion by the parties and upon the foregoing papers submitted by the parties, the district court entered summary judgment for plaintiffs. (64a; 414 F.Supp. 473 at 475). The Court issued an opinion dated June 3, 1976 and filed June 4, 1976 (1a; 58a-64a; 414 F.Supp. 473).

After reviewing the pertinent facts, the Court found that:

> "No genuine issue of fact exists in this action. The question of whether a state may continue to exercise supervisory jurisdiction over a pension benefit plan is a question of law to be decided by reference to ERISA and to the legislative history of that act." (60a; 414 F.Supp. 473 at 474)

Judge Metzner supported his conclusion that no genuine issue of fact exists with the following findings:

> a) "ERISA offers full protection to the employee involved in this matter" (62a; 414 F.Supp. 473 at 475);
>
> b) "A contrary result [i.e., 'continuing state regulation and investigation based solely upon the fact that pension credits were accumulated prior to January 1, 1975'] would create a chaotic condition in this field and violate the whole purpose of ERISA" (63a; 414 F.Supp. 473 at 474);
>
> c) "There is no cause of action arising prior to January 1, 1975 involved in this case" (63a; 414 F.Supp. 473 at 475);
>
> d) "There is no showing of an act or omission by plaintiffs with respect to the Pension Fund member prior to [January 1, 1975]" (63a; 414 F.Supp. 473 at 475);
>
> e) "The Insurance Department was seeking to investigate the present status of the member who wished to know if he is now credited by his pension plan for a year's employment with another Teamsters union as well as for his employment with the Bakery Drivers Union" (63a; 414 F.Supp. 473 at 475).

The Court examined the relevant legislative history of ERISA and the terms of the statute itself, and concluded that:

> a) "[t]he legislative history of ERISA shows that Congress intended absolute preemption of the field of employee benefit plans" (61a; 414 F.Supp. 473 at 474);
>
> b) "[p]reemption of the field was intended to provide for uniform regulation of employee benefit plans" (61a-62a; 414 F.Supp. 473 at 474);
>
> c) "[t]he purpose of ERISA was to provide for federal regulation of the field with a limited exception to permit an orderly transition from state to federal regulation of employee benefit plans by permitting state agencies to dispose of matters pending before them prior to the effective date of the new law" (62a; 414 F.Supp. 473 at 474-75);
>
> d) "Section 1144(b)(1) [514(b)(1)] is obviously not intended to permit continuing state regulation and investigation based solely upon the fact that pension credits were accumulated prior to January 1, 1975." (63a; 414 F.Supp. 473 at 474);
>
> e) "In order to prevent this contravention of the purpose of ERISA, the exception to federal regulation must be narrowly construed to limit state regulation to what is essentially a cleanup role, that is, to the disposition of causes of action and disputes

with respect to employee benefit plans existing before January 1, 1975" (63a-64a; 414 F.Supp. 473 at 475).

Thus, the Court below unequivocally found on the basis of the ample documentary evidence and after argument of the issues that no genuine issue of fact exists herein; and held that, as a matter of law, Section 514(b)(1) is not intended to permit continuing state regulation and investigation based solely upon the fact that pension credits were accumulated prior to January 1, 1975. The Court further held that the exception to the absolute preemption of state law by ERISA provided by Section 514(b)(1) must be narrowly construed to limit state regulation with respect to employee benefit plans to the disposition of causes of action and disputes existing before January 1, 1975.

The sole issue before this Court on appeal is therefore whether the district court erred in its

determination of the law.

Plaintiffs-Appellees' Contentions

Plaintiffs-Appellees contend that:

1) There being no issue of fact, summary judgment was the appropriate remedy.

2) The Insurance Department has no jurisdiction in the absence of proof of a cause of action, act or omission which occurred before January 1, 1975.

3) Mere accumulation of pension credits by a pension plan participant prior to January 1, 1975 is not a cause of action which arose, or an act or omission which occurred before that date within the meaning of Subsection 514(b)(1) of ERISA.

4) The Superintendent of Insurance has failed to establish any other valid basis for jurisdiction herein.

These contentions will be considered in the order above-stated.

ARGUMENT

POINT I

THERE BEING NO ISSUE OF FACT, SUMMARY JUDGMENT WAS THE APPROPRIATE REMEDY

A. The Defendant Previously Contended That There Were Issues of Fact, But Failed to Support This Claim.

The defendant initially contended that there were issues of fact herein, but failed to support this claim. The answer denies allegations of the complaint and alleges the existence of certain facts as an "affirmative defense."

Defendant's Statement Pursuant to Rule 9(g), submitted in opposition to plaintiffs' motion for summary judgment, also alleges that issues of fact exist, but is devoid of any proof supporting such allegations. Two letters are annexed to this statement as exhibits, but they raise no genuine issue of fact to be tried. Defendant's memorandum in opposition to plaintiffs' motion for summary judgment raises no factual issues.

B. The Superintendent of Insurance Has Not Claimed on Appeal That Any Issue of Fact Exists.

The district court concluded that "no genuine issue of fact exists in this action" (60a; 414 F.Supp. 473). The Superintendent of Insurance has not claimed to the contrary on appeal that any issue of fact exists. Defendant-appellant's brief on appeal recites a number of factual findings of the district court in his Statement of the Case, but challenges no specific finding of the Court. The brief attempts to raise certain "factual" issues in passing (as did defendant's memorandum below in almost identical language). As shown below, these contentions are sham and frivolous.

Accordingly, the district court properly determined that there was to issue of fact to be tried and that summary judgment was therefore an appropriate remedy.

POINT II

THE INSURANCE DEPARTMENT HAS NO JURISDICTION IN THE ABSENCE OF PROOF OF A CAUSE OF ACTION, ACT OR OMISSION WHICH OCCURRED BEFORE JANUARY 1, 1975.

A. ERISA Supersedes State Laws Regulating Employee Benefit Plans.

The district court correctly determined that, subject to the narrow exception contained in Section 514(b)(1) concerning causes of action and disputes existing before January 1, 1976,"Congress intended absolute preemption of the field of employee benefit plans" when it enacted ERISA (61a; 414 F.2d 473 at 474).

Subsection 514(a) of the Act explicitly states that the substantive* and enforcement** provisions

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*See ERISA Title I, Parts 1-4, §§101-414; 29 U.S.C.A. §§1021-1114.

**See ERISA Title I, Part 5 §§501-514; 29 U.S.C.A. §§1131-1144 and Title III §§3001-3004; 29 U.S.C.A. §§1201-1204.

ERISA establishes administrative and enforcement procedures (§501 et seq.) and reporting and disclosure requirements (§101 et seq.) which supersede and replace

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of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plans," with the narrow exception of "any cause of action which arose, or any act or omission which occurred, before January 1, 1975" set forth in Subsection 514(b)(1).*

The legislative history of ERISA (cited by plaintiffs and by the district court) also shows that Congress intended broad preemption of state laws regulating employee benefit plans.

As Senator Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare,

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prior similar State procedures and requirements governing employee benefit plans. The Secretary of Labor has full authority to investigate actual or potential violations of ERISA (§504). He is also authorized to undertake research relating to employee benefit plans (§513), and has the power to promulgate regulations concerning such plans pursuant to the provisions of ERISA (§505). The Secretary of Labor is further authorized to bring civil actions in a wide variety of cases in support of his enforcement powers (§502).

*Subsection 514(c) broadly defines the term "State law" to include "all laws, decisions, rules, regulations, or any other State action having the effect of law, of any state." Subsection 3(2) defines "employee benefit plan" to include the Pension Fund.

stated in the introduction to the conference report on ERISA:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." [1974] U.S. Code Cong. & Admin. News pp. 5188-89.

Preemption of state laws is essential to achieve uniform federal regulation of employee benefit plans,* an important purpose of Congress in enacting ERISA.

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*The Superintendent of Insurance apparently agrees. Defendant-Appellant's Brief states that: "[i]t is not disputed that ERISA was desinged [sic] to achieve uniform regulation of pension plans" (Def.-App. Br. p.7).

The report of the House Committee on Education and Labor states in pertinent part that:

> "Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports." [1974] U.S. Code Cong. & Admin. News p. 4655

Creation of uniform regulation of employee benefit plans is a key goal of ERISA because of the interstate character of employee benefit plans. A uniform federal system of regulation eliminates the need to refer continually to both federal and state law, makes it unnecessary for plan administrators and participants to reconcile federal and state regulations, and makes it unnecessary for plan administrators to respond to duplicate demands by federal and state regulators. As the House Committee on Education and

Labor further stated:

> "...The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." [4650] [1974] U.S. Code Cong. & Admin. News pp. 4650

Thus, the district court correctly concluded on the basis of such legislative history that "[p]reemption of the field was intended to provide for uniform regulation of employee benefit plans" (61a; 414 F.Supp. 473 at 474).

B. Subsection 514(b)(1) Is A Narrow Exception To Preemption of State Law

Subsection 514(b)(1) of ERISA is a narrow exception to the explicit withdrawal of jurisdiction to regulate employee benefit plans from the Insurance Department by Section 514(a) of that act which provides that Section 514 "shall not apply with respect to any cause of action which arose, or act or omission which occurred, before January 1, 1975."

This exception to federal preemption of state law is intended to permit an orderly transition from state to federal regulation by permitting state agencies such as the Insurance Department to close out matters pending before them prior to the effective date of ERISA. The provision is not intended to prolong the jurisdiction of the Insurance Department and other state agencies regulating employee benefit plans indefinitely. Judge Metzner reached a similar conclusion, stating that in order to prevent contravention of ERISA:

> "...the exception to federal regulation must be narrowly construed to limit state regulation to what is essentially a cleanup role, that is, to the disposition of causes of action and disputes with respect to employee benefit plans existing before January 1, 1975." (63a-64a; 414 F.Supp. 473 at 475).

On this basis, the district court properly found that 514(b)(1) is a:

> "limited exception to permit an orderly transition from state to federal regulation of employee benefit plans by permitting state

agencies to dispose of matters pending before them prior to the effective date of the new law." (62a; 414 F. Supp. 473 at 474)

C. Other Exceptions to Subsection 514(a) Cited Are Inapplicable

Defendant-appellant erroneously claims that certain other exceptions to Section 514(a) are applicable herein.

Subsection 514(b)(4), which states that preemption "shall not apply to any generally applicable criminal law of a State," has nothing to do with the prosecution of violations of the Insurance Law relating to employee benefit plans. The judgment entered by the district court prohibits the Superintendent of Insurance from proceeding against the Trustees "by reason of any alleged violation of the Insurance Law of the State of New York" (66a), and not prosecution pursuant to a "generally applicable criminal law" of the State.

Similarly, the exception to preemption concerning insurance regulation provided by Subsection

514(b)(2)(A) has no relevance herein, since Subsection 514(b)(2)(B) states that neither an employee benefit plan, nor any trust established under such a plan "shall be deemed to be an insurance company or other insurer...for purposes of any law of any state purporting to regulate insurance companies...." Moreover, there has been no prior indication by the Superintendent that he asserts jurisdiction over the Trustees on any basis but Article III A of the Insurance Law which regulates employee benefit plans, not insurance.*

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*Defendant-appellant also refers to Dep't of Social Services v. Dublino, 413 U.S. 405 (1973). Dublino is clearly distinguishable, but to the extent that it is relevant at all to this appeal, it supports plaintiffs-appellees' position. See 413 U.S. 405 at 411-17. For example, in Dublino, the Court said "In sum, our attention has been directed to no relevant argument which supports, except in the most peripheral way, the view that Congress intended, either expressly or impliedly, to preempt state work programs." 413 U.S. 405, 417. Precisely the opposite is the case herein.

POINT III

MERE ACCUMULATION OF PENSION CREDITS BY A PENSION PLAN PARTICIPANT PRIOR TO JANUARY 1, 1975 IS NOT A CAUSE OF ACTION WHICH AROSE, OR AN ACT OR OMISSION WHICH OCCURRED BEFORE THAT DATE WITHIN THE MEANING OF SUBSECTION 514(b)(1) OF ERISA

A. The Original Basis for Assertion of Jurisdiction by the Superintendent of Insurance Was The Earning or Accumulation of Pension Credits Prior to January 1, 1975.

The Superintendent of Insurance originally based his assertion of jurisdiction over the Trustees of the Pension Fund upon the earning or accumulation of pension credits by a Pension Fund member prior to January 1, 1976 (25a). In his letter dated June 5, 1975 replying to an inquiry by the Trustees as to the basis of the jurisdiction claimed by the Insurance Department on the basis of Section 514 of ERISA (24a), the Superintendent of Insurance said:

> "As you know the ERISA of 1974 provides that the state retains jurisdiction as to any cause of action which arose, or any act or omission which occurred before January 1, 1975.
>
> Inasmuch as almost all of Mr. Eskowitz's pension credits were earned or accumulated prior to January 1, 1975, this Department has not been superseded in this matter." (25a)

The Trustees later replied to these assertions as follows:

> "...the earning of Pension Credit prior to January 1, 1975 does not of itself constitute a 'cause of action which arose, or any act or omission which occurred, before January 1, 1975' within the meaning of Section 514 of ERISA. Otherwise the jurisdiction of the various States would continue indefinitely regardless of the commission of any wrongful act by the administrators of Pension Funds prior to January 1, 1975." (26 a)

The Trustees reaffirmed this view by a letter dated July 24, 1975 stating:

> "...the Trustees have decided to adhere to their position as previously stated, on the ground of the exclusive jurisdiction of the federal government." (30a)

B. The Superintendent of Insurance Abandoned His Reliance on This Position as a Basis for Jurisdiction.

After answering the complaint, the Superintendant of Insurance ceased to rely upon his previously stated position that earning or accumulation of pension credits alone gave the Insurance Department jurisdiction over the Trustees and the Pension Plan. Defendant failed to support his denial of paragraph 15 of the complaint by affidavit or otherwise. Defendant's memorandum in opposition to plaintiffs' motion for summary judgment conceded that:

> "No one claims that the earning of pension credits constitutes a 'cause of action' or an 'act or omission' within the meaning of §514(b)." (Def. Mem. p. 4)

The district court was in accord with plaintiffs' (and later defendant's) view, stating:

> "Section 1144(b)(1) [514(b)(1)] is obviously not intended to permit continuing state regulation and investigation based solely upon the fact that pension credits were accumulated prior to January 1, 1975. A contrary result would create a chaotic condition in this field and violate the whole purpose of ERISA." (63a; 414 F. Supp. 473 at 475)

On appeal, the Superintendent of Insurance has also abandoned his original position. Defendant-Appellant's brief on appeal states that:

> "No one claims that the earning of pension credits constitutes a 'cause of action' or an 'act or omission' within the meaning of §514(b)." (Def.-App. Br. p. 5)

It is apparent from the repetition of this statement that the original basis of jurisdiction asserted by the Superintendent of Insurance has now been completely abandoned, and there can be no assertion that the Insurance Department has jurisdiction herein by virtue of the earning or accumulation of pension credits by a pension plan participant.*

C. The Terms "Cause of Action Which Arose" and "Act or Omission Which Occurred" Require A Showing of Some Breach of Duty by the Trustees.

Apart from the ultimate abandonment of his original position, it is also evident that a cause of

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*However, the Superintendent of Insurance also claims that Sommers v. Sommers 126 Cal. Rptr. 200, 224 (1st Dist. Ct. App. 1975) "upheld State jurisdiction relating to credits earned prior to 1975" (Def.-App. Br. p. 9; Def. Mem. p. 4). But Sommers refers to ERISA only in pass-

cont.../

action, an act or an omission requires the existence of a controversy or dispute between the parties. Such terms are applicable only to cases where some breach of duty recognized as a cause of action, or some misconduct, which may not rise to the status of a cause of action, but which may reasonably be termed "an act or omission" occurred before January 1, 1975.

POINT IV

THE SUPERINTENDENT OF INSURANCE HAS FAILED TO ESTABLISH ANY OTHER VALID BASIS FOR JURISDICTION HEREIN

A. The Views of Others, Cited by the Superintendent of Insurance, Do Not Support His Position

The Superintendent of Insurance has alleged that the views of the Attorney General of the State of New York ("the Attorney General"), the United States Department of Labor ("the Department of Labor") and the National Association of Insurance Commissioners ("the NAIC") support his position. However, none of the views cited

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ing and states: "As respects MMP-PSM's [the union pension plan's] contention that the Employee Retirement Income Security Program ... preempts all state laws relating to an employee benefit plan, we need not consider this issue." (emphasis supplied)

establish a valid basis for jurisdiction with respect to employee benefit plans.

The Attorney General's opinion letter (12a-15a) does not reach the issue presented herein. The letter states in pertinent part only that state law "remains viable and in effect as to any matters which arose or occurred prior (to January 1, 1977)" (14a). This Court is obviously not bound by an inaccurate, conclusory and unsupported paraphrase of federal law. Moreover, the final paragraph of the opinion indicates that the letter was not intended as more than a "general expression of the situation which now exists...." (15a).

The letter of the Department of Labor upon which defendant-appellant bases his inference that the Department of Labor has tentatively concluded that the state is not violating Subsection 514(a) of ERISA does not support that inference. (See 53a-57a.) His additional claim that the "apparent" views of the Department of Labor should be "given weight by this Court" (Def.-App. Br. p. 9) is completely untenable.

Cases cited by defendant-appellant concerning the weight to be given the views of the Department of Labor support the position of the plaintiffs-appellees.*

The Superintendent of Insurance contends on appeal that the views expressed by the NAIC in a recently issued statement** should be taken into account in deciding

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*In Udall v. Tallman, 380 U.S. 1, 17-18 (1965) the Court states that "[t]he Secretary's interpretation had, long prior to respondents' applications been a matter of public record and discussion," and "almost the entire area covered by the orders in issue has been developed, at very great expense, in reliance upon the Secretary's interpretation." Tallman also indicates that the Secretary's interpretation must be reasonable and that his application of his interpretation must be supported by the facts of the particular case. (380 U.S. 1 supra at 17-18).

Zuber v. Allen, 396 U.S. 168, 192-193 (1969), cites Tallman with approval, but cautions that "a departmental construction of its own enabling legislation... is only one input in the interpretational equation" which the Court will use in construing a statute (396 U.S. 168 supra at 192.) Zuber emphatically states that:

> "[t]he Court may not, however, abdicate responsibility to construe the language employed by Congress." (396 U.S. 168 at 193).

**Statement on Federal Preemption of State Insurance Regulation Under Section 514 of ERISA (July 21, 1976)

the issue presented (Def.-App. Br. pp. 7-8). This statement supports the position of the Trustees rather than the position of the Superintendent of Insurance.

The statement analyzes the "potential preemption" by ERISA of specific state regulatory laws, ranging from laws that concern employee benefit plans to those that concern group insurance plans, and concludes that state laws concerning employee benefit plans are "the most likely to be preempted" (pp. 45-46).

Thus, the NAIC concedes that state laws regulating employee pension benefit plans (such as the Pension Fund) are preempted by ERISA. Defendant-appellant states that the Association "pointed out that there was serious doubt as to the actual intent of Congress to preempt the States from regulating the conduct of welfare fund trustees..." (Def.-App. Br. p. 8), but failed to recognize that the NAIC clearly distinguishes welfare benefit plans from pension benefit plans (p. 48). Even as to welfare benefit plans, the Association's argument is aimed at revision of Section 514 of ERISA, and appears to concede that laws regulating such plans are presently preempted under Section 514 (cf. pp. 55-58).

B. The Superintendent of Insurance May Not Investigate to Determine Whether He Has Jurisdiction

In an effort to create jurisdiction where it is obvious no basis for it exists, the Superintendent of Insurance has tortured logic by arguing that if he could investigate employee benefit plans to determine whether he has jurisdiction, he might find some act or omission which would justify his jurisdiction. This is the equivalent of arguing that if the Superintendent were granted jurisdiction he might be able to create jurisdiction. Acceptance of this view would permit the Insurance Department to continue to investigate employee benefit plans indefinitely despite the clear intent of Congress to the contrary.

Defendant-appellant has shown no valid basis for jurisdiction with respect to the Trustees or the Pension Fund. He has totally failed to set forth any facts showing a cause of action, act or omission which occurred before January 1, 1975, regardless of the basis of jurisdiction asserted.

Moreover, it is undisputed that no claim or communication of any kind was received by the Pension Fund office or by the Trustees of the Pension Fund, and no dispute or controversy of any kind existed between Seymour Eskowitz and the Pension Fund prior to January 1, 1975.

In the absence of any evidence of a cause of action, act or omission which occurred before January 1, 1975, the district court properly granted plaintiffs' motion for summary judgment.

CONCLUSION

For the foregoing reasons, the appeal of the Superintendent of Insurance should be denied, and the opinion and judgment of the district court affirmed.

Respectfully submitted,

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New York, New York 10016

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Of Counsel:

Samuel J. Cohen
James V. Morgan

Dated: October 22, 1976

STATUTES

Section 514 [29 U.S.C.A. §1144] of ERISA

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

Article III A New York Insurance Law §37-1

"7. [now 8.] (a) Any person who wilfully violates or causes or induces the violation of any provision of this article or any regulation hereunder shall be guilty of a misdemeanor.

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact in any registration, examination, statement or report required under this article or the regulations thereunder shall be guilty of a misdemeanor.

(c) Any person who makes a false entry in any book, record, report, or statement required by this article or any regulation thereunder to be kept by him for any employee welfare fund, with intent to injure or defraud such fund or any beneficiary thereunder,

or to deceive any one authorized or entitled to examine the affairs of such fund shall be guilty of a misdemeanor.

(d) Nothing in paragraphs (b) or (c) of this subdivision shall be construed in any manner to limit the effect of paragraph (a)."

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 76-7329

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund *Plaintiff*

against

THOMAS A. HARNETT, As Superintendent of Insurance of the State of New York *Defendant*

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is an associate of the firm of Cohen, Weiss and Simon, *attorney(s) of record for*

Plaintiffs-Appellees

That on October 22, *19*76 *deponent served the annexed*

Brief of Plaintiffs-Appellees

on Robert S. Hammer

attorney(s) for Defendant-Appellant

in this action at Two World Trade Center, New York, New York 10047

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated October 22, 1976

James V. Morgan

The name signed must be printed beneath

JAMES V. MORGAN

Attorney at Law

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

That on *19* *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

.....

The name signed must be printed beneath